**IN THE CIRCUIT COURT OF COLE COUNTY**
**STATE OF MISSOURI**

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| HEALTH MIDWEST, a Missouri public benefit, non-profit corporation,<br><br>Plaintiff and Counterclaim Defendant,<br><br>v.<br><br>JEREMIAH W. (JAY) NIXON, Attorney General of the State of Missouri,<br><br>Defendant and Counterclaim and Cross-Claim Plaintiff,<br><br>v.<br><br>MALCOLM M. ASLIN, et al., in their individual capacities and as Directors of Health Midwest,<br><br>Cross-Claim Defendants. | ) | Case No. 02CV326118<br>Division II |

**ATTORNEY GENERAL'S SUGGESTIONS IN OPPOSITION TO**
**HEALTH MIDWEST'S MOTION FOR PROTECTIVE ORDER**

COMES NOW Jeremiah W. (Jay) Nixon, Attorney General of the State of Missouri, in opposition to the Motion for Protective Order filed by Health Midwest on December 3, 2002, and offers the following suggestions in opposition to such motion:

This court should deny Health Midwest's motion for a protective order for two reasons. First, with its motion, Health Midwest failed to present any evidence beyond generalized assertions that the information to be revealed through discovery in this case is a "trade secret or other confidential research, development, or commercial information" within the meaning of Missouri Supreme Court Rule 56.01(c)(7). Second, Health Midwest failed to meet its burden of

showing that good cause exists to enter a protective order in this case, particularly in light of the significant public interest in the details of the proposed sale of Health Midwest's assets to HCA, Inc. Because Health Midwest has failed to meet these threshold requirements, this court may not enter a protective order shielding Health Midwest from complying with the usual discovery rules.

**Background**

"As a general rule, pretrial discovery proceedings are conducted in public unless compelling reasons exist to deny public access." ***DeJONG v. Bell Helicopter Textron Inc.***, 124 F.R.D. 207, 208 (W.D. Mo. 1988). With this general principle as background, this court has authority to enter a protective order only within the explicit parameters of Rule 56.01(c). The relevant portions of Missouri's Rule 56.01(c) provide:

> **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court may make any order which justices requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:
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> (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way;

This Rule is modeled after Federal Rule of Civil Procedure 26(c) and, accordingly, Missouri courts have recognized the persuasiveness of federal authority in the interpretation of the Rule's language. ***Stortz by Stortz v. Seier***, 835 S.W.2d 540, 541 (Mo. Ct. App. E.D. 1992); ***State ex rel. Blue Cross & Blue Shield v. Anderson***, 897 S.W.2d 167, 170 (Mo. Ct. App. S.D. 1995).

By its plain language, the Rule establishes the threshold showing which must be met, specifically that a protective order may only be entered "for good cause shown." This means that the party seeking to limit the discovery of information bears the initial burden of justifying a departure from the normal open and public process. ***See In re: Remington Arms Co.***, 952 F.2d 1029, 1032 (8th Cir. 1991) (explaining that, under the analogous Federal Rule 26(c), the party opposing discovery must make the initial showing that the information sought is protected and disclosure would result in harm) *on remand at* 143 F.R.D. 673 (W.D. Mo. 1992); ***see also Cuno Inc. v. Pall Corp.***, 117 F.R.D. 506, 508 (E.D.N.Y. 1987) ("It is well established that the party seeking the issuance of a protective order bears the burden of demonstrating good cause to support such an order.").

The burden of demonstrating "good cause" can only be met by a two-pronged showing. First, the party seeking protection must prove that the material "for which protection is sought is an actual trade secret or other confidential business information protected under [the federal rule]." ***Andrew Corp. v. Rossi***, 180 F.R.D. 338, 340 (N.D. Ill. 1998). Second, the party opposing discovery must establish good cause for the protective order. ***See id.***

Even if "good cause" can be shown, the court may not enter a protective order without balancing the injury that might result from disclosure against the opposing party's need for the information, ***see In re: Remington Arms Co.***, 952 F.2d at 1032 (analyzing Federal Rule 26(c)), or, as in this case, the public's legitimate interest in the materials to be disclosed.

I. **Health Midwest has not presented evidence that the information to be sought by the Attorney General constitutes a "trade secret" or "confidential research, development or commercial information."**

A party seeking a protective order must first show that the information sought in discovery is a "trade secret" or "confidential research, development, or commercial information." The Southern District Court of Appeals, in a rule 56.01(c)(7) case, has indicated that federal courts have applied four factors when determining whether information constitutes a trade secret for the purposes of the federal rule governing protective orders. ***State ex rel. Blue Cross & Blue Shield v. Anderson***, 897 S.W.2d 167, 170 (Mo. Ct. App. S.D. 1995). These factors are as follows: 1) the extent that the information "is known outside of the business"; (2) the extent that the information is known by those involved in the business; (3) the extent of the measures taken by the business to keep the information secret; and (4) the information's value to the business and its competitors. ***Id.*** In ***Anderson***, the information sought to be discovered was identified as three specific documents: current pricing arrangements between certain entities; studies of health care and hospital costs in the area; and a provision of a certain contract. ***Id.*** at 169.

In its motion, Health Midwest does not specify the documents that it seeks to protect. Health Midwest has failed to show that the information sought in discovery in this case constitutes a "trade secret" or "confidential research, development, or commercial information." Health Midwest's Motion for Protective Order contains only vague and conclusory statements that it possesses information that is confidential and proprietary. For example, Health Midwest asserts that the information is "not publicly available" and that "Health Midwest and HM Acquisition have an obligation to keep much of the information confidential." Motion, ¶5. It

claims that disclosure of the information will cause "oppression and undue burden" and place Health Midwest and Health Midwest Acquisition at a "competitive disadvantage." Motion, ¶5. But these assertions, without further explanation, fail to show that the information falls within the parameters of 56.01(c)(7). Without more specificity, this court cannot apply the ***Anderson*** factors to determine whether Health Midwest has met its burden for a protective order.

Mr. Hiersteiner's affidavit, filed with Health Midwest's motion, fails to provide any of the necessary details to augment Health Midwest's claim that Health Midwest's documents deserve protection. Rather, Mr. Hiersteiner states that "[s]ome documents of Health Midwest contain confidential and proprietary information" and that the "officers of Health Midwest have a fiduciary obligation not to reveal this proprietary and confidential information." Motion, Exhibit A, Affidavit of Joseph L. Hiersteiner, ¶4. These assertions do not give this court a proper basis for concluding that the information sought appropriately falls within the confines of Rule 56.01(c).

In ***Andrew Corporation v. Rossi***, the plaintiff sought a protective order under Federal Rule 26(c)(7), and sought to establish that the information at issue was proprietary business information. ***Andrew Corp.***, 180 F.R.D. at 338 (N.D. Ill. 1998). The plaintiff presented an affidavit from its Vice President, indicating that "all of the information covered by [the plaintiff's] proposed order is maintained as confidential, kept in locked files, and access is granted only to employees and consultants on a need-to-know basis." This affidavit provided further evidence that the information was confidential: the items were clearly marked as confidential and proprietary; plaintiff's employees were required to sign confidentiality agreements at the beginning of their employment; and when employees leave employment, they

must sign a statement that reminds them of their confidentiality responsibilities. ***Id.*** at 341. The District Court refused to credit plaintiff's showing of confidentiality. Although the Court acknowledged that "[plaintiff] regards nearly everything concerning its business as confidential," the District Court observed that "[w]ithout more than [plaintiff's] self-serving statements, [the court could not] determine whether such assertions are legitimate, or merely due to an overdeveloped sense of self-importance." ***Id.***

Health Midwest here presents much less evidence of confidentiality than the court in ***Andrew Corporation*** had to consider. Neither Health Midwest's Motion nor the Affidavit filed with the Motion identify the purportedly confidential information to which Health Midwest refers, and even less evidence as to whether this information is confidential and proprietary and maintained as such. Health Midwest's Motion asserts the same type of "self-serving statements" that were found insufficient by the court in ***Andrew Corporation***. Thus, Health Midwest has failed to establish that the information sought in discovery falls within the parameters of Rule 56.01(c).

## II. Plaintiff has not presented sufficient evidence to establish that "good cause" exists for limiting disclosure of the information to be sought by the Attorney General.

Even if the movant for a protective can show that the specific information sought in discovery is worthy of protection, "good cause" must be still shown before a court can enter a protective order. ***Brown v. McIBS, Inc.***, 722 S.W.2d 337, 342-43 (Mo. Ct. App. E.D. 1986). Although the court can exercise discretion in determining whether "good cause" exists, "the trial court must have evidence presented before it can exercise discretion." ***Id.*** at 343. Under the

analogous Federal Rule 26(c), those seeking a protective order must demonstrate good cause by showing "a particular need for protection. Broad allegations of harm that are not substantiated by specific examples or articulated reasoning" are insufficient. ***State ex rel. Wright v. Campbell***, 938 S.W.2d 640, 646 at n. 1(Mo. Ct. App. E.D. 1997) (Crandall, J. *concurring in the result*) (citation omitted).

As the Eighth Circuit indicated in the context of Federal Rule 26(c), the burden is on the party seeking the protective order to show its necessity, "which contemplates 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." ***Gen'l Dynamics Corp. v. Selb Mfg. Co.***, 481 F.2d 1204, 1212 (8th Cir. 1973) (*quoting* WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2035 at 264-65); ***see also Glenmede Trust Co. v. Thompson***, 56 F. 3d 476, 483 (3rd Cir. 1995) (noting that for "good cause" under Federal Rule 26(c), "[b]road allegations of harm, unsubstantiated by specific examples . . . will not suffice."). In ***Cuno Inc. v. Pall Corp.***, the court found that a conclusory statement that information had been maintained as "internal proprietary documents" and that the documents contained "valuable confidential technical information" was insufficient to show good cause under Federal Rule 26(c). ***Cuno Inc. v. Pall Corp.***, 117 F.R.D. 506, 508 (E.D.N.Y. 1987). Although the party seeking the protective order had listed the documents for which the protective order was sought, it "failed to specifically identify a clearly defined and serious injury that will occur in the event such documents are disclosed." *Id.*

As the court in ***Andrew Corporation v. Rossi*** noted in the context of a Federal Rule 26(c)(7) protective order, "to rule that certain confidential business information may be categorically protected treads dangerously close to the Supreme Court's prohibition [that "'there

is no absolute privilege for trade secrets and similar confidential information'"]. 180 F.R.D. 338, 342 (N.D. Ill. 1998) (***quoting Fed'l Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill***, 433 U.S. 340 (1979)). Thus, the court concluded that the plaintiff's "continuous conclusory assertions that any unprotected disclosures" in certain broad categories will result in competitive harm to the plaintiff's market position did not meet Rule 26(c)'s requirement of good cause. ***Id.*** Similarly, a federal district court has noted that "[a] conclusory statement that proprietary, confidential business documents deserve protection does not suffice. Business documents as a category do not qualify as intrinsically confidential and personal." ***Dahdal v. Thorn Americas, Inc.***, 1997 U.S. Dist. LEXIS 14792, at *4-5 (D. Kan. 1997). The court further noted, "[to] obtain an order protecting the confidentiality of business documents, the movant must do more than simply state that such documents are proprietary and confidential." ***Id.*** at 5.

Health Midwest"s Motion for Protective Order fails to establish "good cause" because it does not show a "particularized need for protection" or anything more than "broad allegations of harm." Nothing in Health Midwest's Motion for a Protective Order goes beyond generalized, conclusory statements regarding confidentiality. Health Midwest's Motion does not contain any specifics on what information they are concerned is "confidential and proprietary" nor do they explain what type of "particularized harm" would result from disclosure of the information, other than to generally state that disclosure of confidential information would put Health Midwest or Health Midwest Acquisition at a "competitive disadvantage." Motion, ¶5. Mr. Hiersteiner's Affidavit reiterates the vague language contained in Health Midwest's Motion: that "[s]ome documents of Health Midwest contain confidential and proprietary information" and that the "officers of Health Midwest have a fiduciary obligation not to reveal this proprietary and

confidential information." This is not the type of information that could, even generously, be called "a particular and specific demonstration of fact." ***DeJONG v. Bell Helicopter Textron***, 124 F.R.D. 307, 208 (W.D. Mo. 1988) (***quoting*** WRIGHT & MILLER FEDERAL PRACTICE & PROCEDURE: CIVIL § 2035 at 264-65).

## III. Plaintiff has not presented evidence that would meet any bare minimum threshold showing of "good cause."

Health Midwest cannot avoid its burden of proof by characterizing its proposed protective order as a "blanket protection order." ***See Bayer AG & Miles v. Barr Labs., Inc.***, 162 F.R.D. 456, 465 (S.D.N.Y. 1995) (a blanket protective order "permits the parties to protect documents that they in good faith believe contain trade secrets or other confidential commercial information."); and ***Gillard v. Boulder Valley School Dist. RE-2***, 196 F.R.D. 382, 386 (D. Colo. 2000) (under a "blanket protection order" the party against whom discovery is sought can designate information it believes is "confidential or otherwise entitled to protection"). Courts that have allowed blanket protection orders **still require** a threshold showing of good cause. ***Allied Corp. v. Jim Walter Corp.***, 1996 U.S. Dist. LEXIS 8845, at *16 (E.D. Pa. 1996); ***Gillard***, 196 F.R.D. at 386.

For example, in ***Gillard***, the court found that the plaintiffs had made a threshold showing "to believe that discovery would involve the disclosure of confidential information, including personnel records, school records with personally identifiable information about students, and juvenile delinquency records." ***Id.*** These records were the sort "all of which normally are required to be maintained confidentially." ***Id.*** Health Midwest's Motion, by contrast, has made no such showing of presumptively confidential categories of documents.

When courts have upheld blanket protective orders, it is often in the context of complex cases where both parties have consented to the protective order so as to protect the confidentiality of each party's information. The situation at present is quite different because the Attorney General has a duty to review the proposed transaction in an open and public manner. The Attorney General has no interest in permitting Health Midwest to protect the confidentiality of anything other than documents which, if released, would cause immediate and actual harm to the value of the non-profit assets Health Midwest holds. Health Midwest's end-run to litigation and around the Attorney General's public review of Health Midwest's proposed sale should not be rewarded by giving it more secrecy in court than they would be entitled to out of court.

It is for this reason that "[c]ourts have distinguished protective orders issued in cases involving important public interests from those involving matters of interest only to private litigants." ***Holland v. Summit Autonomous, Inc.***, 2001 U.S. Dist. LEXIS 12659, at *7 n. 1 (E.D. La. 2001) *aff'd by and review denied by* 2001 U.S. Dist. LEXIS 15732 (E.D. La. 2001). As noted in ***Andrew Corp. v. Rossi***, 180 F.R.D. 338, 343 (N.D. Ill. 1998), "[t]he case law is clear: protective orders which would remove portions of the judicial process from public scrutiny cannot be granted with reckless abandon." The transaction between Health Midwest and HCA Corporation involves the largest conversion of a nonprofit hospital system to a for-profit system in this country's history. The assets Health Midwest proposes to sell are supposed to be held for and managed for the benefit of the public. Thus, this transaction -- and the lawsuit Health Midwest has begun to facilitate that sale -- clearly involve the public interest, as evidenced by the intense public scrutiny and media coverage over the proposed transaction. Accordingly, this

court should not enter a blanket protective order that would allow Health Midwest to shirk the plain requirements of Rule 56.01.

**Conclusion**

Health Midwest has failed to establish the minimum requirements for a protective order under Rule 56.01(c). First, it has not offered specific evidence that the information sought is a "trade secret" or "other confidential research, development, or commercial information." Second, Health Midwest has not shown good cause for the order because it asserts only generalized and conclusory statements of the sort that other courts have found insufficient to establish "good cause." Finally, the public's ability to monitor and comment on the proposed transaction will be thwarted by a blanket protective order that is not justified by the minimum showing required under Rule 56.01(c). For those reasons, Health Midwest's Motion for Protective Order should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the above and foregoing was mailed, first class and postage prepaid, this 12th day of December, 2002 to:

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